

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

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4
5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 v.

No. CR-03-012-FVS

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10 ORDER DENYING 2255 MOTION

11 PABLO HERRERA-SUSTAITA,

12 Defendant.

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17 **THIS MATTER** is before the Court on the defendant's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, Ct. Rec. 34. The defendant is acting *pro se* in this matter and the government is represented by Pamela J. Byerly. The Court has reviewed the entire file, including the pleadings submitted by both parties, and is now prepared to rule.

18 **BACKGROUND**

19 On June 17, 2003, the Court sentenced the defendant based on his
20 plea of guilty to the offense of Alien in the United States after
21 Deportation in violation of 8 U.S.C. § 1326. The defendant's base
22 offense level, as set forth by U.S.S.G. § 2L1.2, was 8. Ct. Rec. 21.
23 Pursuant to U.S.S.G. § 2L1.2(b)(1)(B), this level was enhanced by 12
24 levels because the defendant was previously deported after conviction
25 for an aggravated felony. Ct. Rec. 21. In accordance with U.S.S.G.
26 § 3E1.1(a) and (b), the defendant's offense level was reduced by

1 three levels for timely acceptance of responsibility. Ct. Rec. 21.
2 After adjustments were made, the defendant had an adjusted offense
3 level of 17. Ct. Rec. 21. He fell into Criminal History Category V,
4 which gave him a guideline range of 46-57 months imprisonment. The
5 Court sentenced the defendant to 46 months imprisonment. The
6 defendant timely appealed to the Ninth Circuit, Ct. Rec. 23, which
7 issued a mandate affirming the decision of this court, Ct. Rec. 33.
8 The defendant now moves to vacate his sentence pursuant to 28 U.S.C.
9 § 2255.

10 **DISCUSSION**

11 **A. *Grounds for Relief***

12 The defendant argues in his § 2255 motion that his sentence is
13 unconstitutional pursuant to the United States Supreme Court's
14 decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159
15 L.Ed.2d 403 (2004). The defendant also argues that he received
16 ineffective assistance of counsel. Under the theory of ineffective
17 assistance of counsel, the defendant raises a number of arguments.
18 The defendant argues that his counsel was constitutionally
19 ineffective because (1) his counsel did not attempt to get a better
20 plea agreement or reduced and/or concurrent sentence, (2) an
21 indictment was not filed within thirty days of the defendant's
22 arraignment, and (3) the defendant's guilty plea was not made
23 voluntarily and intelligently.

24 Under 28 U.S.C. § 2255, a federal prisoner may move the court to
25 vacate, set aside, or correct his or her sentence on the grounds that
26 (1) the sentence was imposed in violation of the Constitution or laws

1 of the United States; (2) the court was without jurisdiction to
2 impose such sentence; or (3) the sentence was in excess of the
3 maximum authorized by law.

4 **B. Applicability of Blakely:**

5 The defendant's contention that the Court violated *Blakely* when
6 it sentenced him based on facts neither admitted by him or found by a
7 jury is not a basis for § 2255 relief in this case. The Ninth
8 Circuit has held that *Blakely* is only retroactive to cases that were
9 on direct appeal at the time the *Blakely* decision was handed down.
10 *Schardt v. Payne*, -- F.3d --, 2005 WL 1593468 (9th Cir. 2005)
11 (holding that "the Supreme Court announced a new rule in *Blakely v.*
12 *Washington* that does not apply retroactively to a conviction that was
13 final before that decision was announced"). Here, the defendant was
14 sentenced on June 17, 2003, Ct. Rec. 20. He timely appealed to the
15 Ninth Circuit, Ct. Rec. 23, which issued a mandate affirming the
16 decision of this court on February 18, 2004, Ct. Rec. 33. *Blakely*
17 was decided on June 24, 2004. The disposition of the defendant's
18 direct appeal to the Ninth Circuit became final before *Blakely* was
19 issued, and therefore, *Blakely* is not applicable to the defendant's §
20 2255 request.

21 **C. Ineffective Assistance of Counsel:**

22 To establish ineffective assistance of counsel, a defendant must
23 show (1) "that counsel's representation fell below an objective
24 standard of reasonableness"; and (2) "that there is a reasonable
25 probability that, but for counsel's unprofessional errors, the result
26 of the proceeding would have been different." *United States v.*

1 *McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996) (quoting *Strickland v.*
2 *Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064, 2068, 80
3 L.Ed.2d 674 (1984)) (internal quotation marks omitted). To satisfy
4 the first prong, counsel's performance must have been "outside the
5 wide range of professionally competent assistance." *Hart v. Gomez*,
6 174 F.3d 1067, 1069 (9th Cir. 1999) (quoting *Strickland*, 466 U.S. at
7 690, 104 S.Ct. at 2066) (internal quotation marks omitted). Under
8 the second prong, "[a] reasonable probability is a probability
9 sufficient to undermine confidence in the outcome." *Id.* (quoting
10 *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068) (internal quotation
11 marks omitted).

12 1. *Determination of Sentence*

13 The defendant argues that counsel was ineffective because it did
14 not obtain the best plea agreement or a reduced and/or concurrent
15 sentence. The defendant argues that an agreement should have been
16 reached based on the "fast track" system or something similar. The
17 Court determines that the defendant's claim is incorrect. Defense
18 counsel did not act outside the prevailing professional norms in
19 regards to the plea agreement the defendant reached with the United
20 States. The "fast track" system is not available in the Eastern
21 District of Washington, and therefore could not form the basis for a
22 "better" plea agreement. In addition, the Court's records indicate
23 that defense counsel filed a motion for a downward departure from the
24 sentencing range. Ct. Rec. 15. It was within the Court's discretion
25 to deny the defendant's motion for downward departure, which it chose
26 to do. *United States v. Dubose*, 146 F.3d 1141, 1143 n.1 (9th Cir.

1 1998) (finding the record reflected "that the court recognized that
2 it had the discretion to depart downward but simply refused to do
3 so"). The Court ultimately made the determination as to what the
4 defendant's sentence would be in this case.

5 The Court concludes that defense counsel did not act outside
6 prevailing professional norms. The defendant's argument that counsel
7 should have tried to obtain a better plea agreement for him cannot
8 form the basis for an ineffective assistance of counsel claim. The
9 defendant's request for § 2255 relief is denied on this basis.

10 2. *Indictment not Filed within 30 days of Arraignment*

11 The defendant argues that his counsel was ineffective because
12 the indictment charging him with being an alien in the United States
13 following deportation was not filed within 30 days of his arrest
14 and/or arraignment. The record in this case does not support the
15 defendant's contention. An indictment was filed against the
16 defendant on January 8, 2003. Ct. Rec. 1. He was arrested and
17 arraigned the following day, January 9, 2003. Ct. Rec. 2 and 3.
18 These events occurred within the appropriate time frame and
19 defendant's claim that counsel was ineffective because the defendant
20 waived his right to have the indictment filed within 30 days of
21 arraignment is not supported by the record. The defendant's request
22 for § 2255 relief is denied on this basis.

23 3. *Voluntary and Intelligent Plea*

24 The defendant argues he received ineffective representation from
25 counsel, which led to the entry of a guilty plea that was not
26 voluntary and intelligent. A guilty plea is valid if it is

1 "voluntary and intelligent." *United States v. Hernandez*, 203 F.3d
2 614, 618. "A plea is 'involuntary' if it is the product of threats,
3 improper promises, or other forms of wrongful coercion." *Id.* at 619
4 (citing *Brady v. United States*, 397 U.S. 742, 754-55, 90 S.Ct. 1463,
5 1472, 25 L.Ed.2d 747 (1970)). A plea is "'unintelligent' if the
6 defendant is without the information necessary to assess
7 intelligently 'the advantages and disadvantages of a trial as
8 compared with those attending a plea of guilty.'" *Id.* (quoting *Brady*,
9 397 U.S. at 754, 90 S.Ct. at 1472).

10 During the defendant's change of plea hearing he was asked if
11 anyone had threatened to harm him or someone in his family to force
12 him to plead guilty to any crime, and to this question he answered
13 no. Ct. Rec. 10 at 13. The defendant also answered in the negative
14 when asked about whether there were any other promises or
15 understandings between the defendant and the United States. Ct. Rec.
16 10 at 12. When questioned about whose decision it was to enter a
17 plea, the defendant stated that it was his decision. Ct. Rec. 10 at
18 13. The defendant's counsel also indicated to the Court that the
19 defendant's plea was made voluntarily. *Id.* These statements, taken
20 together, indicate that the defendant's plea was made voluntarily.

21 During the defendant's change of plea hearing he was also asked
22 a number of questions which go to the issue of whether the plea was
23 being made with an understanding of its implications. When
24 questioned by the Court, the defendant answered he understood that
25 pleading guilty to the crime charged meant a forfeiture of the
26 following rights: the right to a trial by jury; the right to see,

1 hear and question witnesses at trial; the right to have an attorney
2 represent him before, during and after trial; the right to remain
3 silent and not be required to testify; the right to subpoena
4 witnesses to come and testify; and the right to have an attorney
5 represent him on appeal. Ct. Rec. 10 at 10-12. The defendant has
6 presented no evidence contrary to that contained in the Court's
7 records. Therefore, the Court determines that the defendant's plea
8 was made voluntarily and intelligently and this is not a grounds for
9 finding that the defendant's counsel acted ineffectively. The
10 defendant's request for § 2255 relief is denied on this basis.

11 **CONCLUSION:**

12 The defendant's direct appeal to the Ninth Circuit was finalized
13 prior to the Supreme Court's ruling in *Blakely* and *Blakely* cannot be
14 applied retroactively to the defendant's case. Defense counsel's
15 performance, in this case, did not fall below an objective standard
16 of reasonableness. The defendant has not demonstrated that defense
17 counsel's performance was lacking to such an extent as to undermine
18 confidence in the outcome of this case. It was this Court that made
19 the ultimate determination to sentence the defendant to 46 months
20 imprisonment. The defendant has not demonstrated any error committed
21 by this Court which would entitle him to habeas corpus relief.
22 Accordingly, the Motion to Vacate, Set Aside or Correct Sentence
23 Pursuant to 28 U.S.C. § 2255 is denied.

24 **IT IS HEREBY ORDERED** that the defendant's Motion to Vacate, Set
25 Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, Ct. Rec. 34,
26 is **DENIED**.

1 **IT IS SO ORDERED.** The District Court Executive is hereby
2 directed to enter this order and furnish a copy to **counsel** and the
3 **defendant**.

4 DATED this 15th day of July, 2005.

s/ Fred Van Sickle
Fred Van Sickle
United States District Judge